

1 happens when we talk about the glossary is we  
2 end up in these legal back and forth about  
3 what constitutes operating, what constitutes,  
4 you know, is this a system or not a system.  
5 And if it's not operating as a system, is it  
6 not operating? The question that is before us  
7 is, as you point out, under 1.955A and C is,  
8 have the stations been constructed? That's  
9 the Part A of the --

10 JUDGE SIPPEL: What does that mean  
11 to you, constructed, the word constructed?

12 MS. KANE: Well, we agree with  
13 Maritime on this that constructed for the  
14 purposes of 1.955A would mean that it was  
15 constructed, built out, and capable of  
16 providing service.

17 JUDGE SIPPEL: But it's not yet,  
18 doesn't yet have to be operating, it can be  
19 just sitting there in the way you've described  
20 it.

21 MS. KANE: Constructed under  
22 80.49A, which is a different section, would

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1       require that it be constructed and operating.  
2       So there needs to be some form of operation at  
3       the time.

4               JUDGE SIPPEL:       Or it's not  
5       constructed.

6               MS. KANE:   It's not constructed,  
7       correct.

8               JUDGE SIPPEL: All right, anything  
9       more? I'm trying to get your position on  
10      this.

11              MS. KANE: I understand. Well our  
12      position, and we very much appreciate the  
13      chart that you included with the order and all  
14      of the effort that that took to put together.

15              JUDGE SIPPEL:       Isn't that  
16      beautiful?

17              MS. KANE:       It was, it was  
18      fantastic. I'm glad I didn't have to do it.  
19      But I think --

20              JUDGE SIPPEL: Don't make me the  
21      ogre on this thing now.

22              MS. KANE: No, no. I think what

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1       that chart showed is that the Bureau is in  
2       agreement with many of the terms that were  
3       proposed by Maritime in its glossary,  
4       including constructed. Now we did not  
5       understand constructed necessarily to be a  
6       legal conclusion.

7                   And I know that the idea for this  
8       glossary was originated at a time when Your  
9       Honor was still trying to decide some of the  
10      discovery disputes that were between the  
11      parties. Right now, the only disputes that  
12      the Bureau has with Maritime over these terms  
13      doesn't include "constructed." We're fine  
14      with the definition of "constructed" the way  
15      it is. But for the purposes of whether a  
16      system was constructed, legally constructed,  
17      we would still require an operating  
18      requirement. However, based on the way the  
19      discovery has gone so far, we don't know that  
20      constructed is really going to be an issue  
21      going forward.

22                   JUDGE SIPPEL: Well, what I'm

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1       trying to avoid, and you know, this is a fine  
2       thing to say now, but when it comes down to  
3       proposed findings and conclusions, it's very  
4       interesting what can all of a sudden become  
5       very important and as we anticipate. And I  
6       don't want to be left at sea. And plus, also  
7       in addition, backing up even, if you're going  
8       to have witnesses testifying in court about  
9       construction or what's constructed, and let me  
10      just throw out the word constructed without an  
11      agreed definition, you're going to be able to  
12      interpret testimony a lot of ways. Let me get  
13      Mr. Havens in on this, or Mr. Chen, do you  
14      want your client to weight in --

15               MR. CHEN:   Mr. Havens has been  
16      imminently involved with the construction of  
17      the glossary and Your Honor did invite him to  
18      take full part in it. And I would like to, I  
19      would request the court respectfully to give  
20      him that opportunity at this moment to opine  
21      on some of these issues.

22               JUDGE SIPPEL:  Come ahead, right,

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1       yes sir, Mr. Havens, go ahead.

2                   MR. HAVENS: Yes, so in the SkyTel  
3       two filings starting with the glossary, they  
4       included the definition of constructed and  
5       construction and construction deadline. And  
6       those set forth, you know, our view. And then  
7       we had legal arguments to accompany those  
8       three.

9                   And those definitely referred to  
10      Bureau and Commission precedent that in the  
11      relevant time period, AMCS was established for  
12      multi-site wide area system coverage, where a  
13      construction requirement, in our view under  
14      the precedent, did require construction and  
15      maintenance of multiple overlapping sites, so  
16      we believe that as part of the construction  
17      requirement.

18                  But also there are other parts of  
19      construction requirements that we cited and we  
20      think are clear in the rules and precedents  
21      including that AMCS is CMRS, not required  
22      their connection, construction requires under

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1 the rules we cited in precedent, service to  
2 subscribers not merely a physical system  
3 capable of operation or even in operation  
4 sending a signal, but with subscribers.

5 JUDGE SIPPEL: Would you do me a  
6 favor then with Mr. Chen? Would you assemble  
7 these authorities and send me copies and send  
8 copies to the parties, that Mr. Havens is  
9 relying on?

10 MR. CHEN: Certainly, certainly do  
11 that. Be very happy to outline and  
12 suggestible form for everyone's benefit --

13 JUDGE SIPPEL: Yes, attach a cover  
14 letter and you can lay it in the way you think  
15 it goes.

16 MR. CHEN: Very much I'd be happy  
17 to do that for you, Your Honor.

18 JUDGE SIPPEL: Okay. I was just  
19 using now constructed as an example of one  
20 thing that seemed to be causing, that there  
21 was difficulty in getting to an agreement on.

22 MR. HAVENS: I appreciate that,

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1 Your Honor, and I'd be happy to prepare that  
2 or Mr. Chen will prepare that in all systems.

3 JUDGE SIPPEL: Okay, thank you.  
4 But as I understand this, your position is  
5 that you can't have, now let's get down, the  
6 issue talks about constructed or operated.  
7 But you can't have a constructed station that  
8 is not servicing an end user. In other words,  
9 you can't call it constructed unless it's  
10 serving an end user. Is that correct?

11 MR. HAVENS: Yes, that's our  
12 position. And we will cite rules and  
13 authorities.

14 JUDGE SIPPEL: All right. And  
15 hold on just a second. You don't agree with  
16 that.

17 MR. KELLER: No I don't, Your  
18 Honor.

19 JUDGE SIPPEL: And the Bureau does  
20 not agree with that.

21 MS. KANE: We do not believe that  
22 for all AMTS service, that you need to have an

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1 end user customer, that there are uses that  
2 are allowed for AMTS service that do not  
3 require an end user customer. So it would be  
4 inconsistent to say that construction would  
5 require end user customers.

6 MR. HAVENS: Well I --

7 JUDGE SIPPEL: Well that's, but  
8 we're not going to argue it here. You're  
9 going to give me your authorities. Let me ask  
10 Pinnacle's counsel.

11 MR. PLACHE: No, we don't agree  
12 with that.

13 JUDGE SIPPEL: You don't agree  
14 with Mr. Havens.

15 MR. PLACHE: It changes so much.

16 JUDGE SIPPEL: Okay.

17 MR. PLACHE: You're going to have  
18 an effect, a ripple effect in all these other  
19 services, even a change in the law --

20 JUDGE SIPPEL: All right, well  
21 that's good enough, that's good enough. All  
22 right, well we'll take a look at what you

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1 have, and I'm not going to spend a heck of a  
2 lot of time on this but I would like to get it  
3 pinned down. Somehow, if you could come to an  
4 agreement then I wouldn't have to reach a  
5 decision on it. And as the, what's going to  
6 be carried forward as the, as you want to call  
7 it, the law of the case on constructed.

8 And I'll give you an example from  
9 my experience. I was in a trust case one time  
10 involving paper mills. And there was actually  
11 an industry, a cottage industry of people that  
12 are just good at doing this. They'll go out  
13 and they'll find a location to put a paper  
14 mill and they'll take care of its construction  
15 from A to Z. And then, it's finished, it's  
16 completed, that person gets paid and it's  
17 called a turnkey facility, that is, you can go  
18 in, turn the key, and start. But it's got  
19 nothing to do with customers.

20 And what I was searching for, some  
21 kind of a similar meaning here. There's a lot  
22 of different ways of talking about a

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1 constructed facility and with customers, with  
2 end users. But constructed is a word,  
3 constructed means constructed. That's where  
4 I want to get this. But I can't force it  
5 there if the industry thinks otherwise.

6 MS. KANE: Your Honor, our rules  
7 in Section 80.49A require that for this type  
8 of site-based license, it needs to be, in  
9 order to be constructed it needs to be placed  
10 in operation. So that's why there has been  
11 such dispute about what constitutes in  
12 operation and in service and what constitutes  
13 operating. So although we would not agree  
14 that there necessarily have to be a precise  
15 customer, I'm just saying --

16 JUDGE SIPPEL: Go ahead, go ahead,  
17 I'm fine, yes.

18 MS. KANE: -- Your Honor, there is  
19 a requirement under our rules that in order to  
20 have met the construction requirement, that  
21 the license must be placed in operation within  
22 the time period. And then conversely --

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1 MR. KELLER: And we'd agree with  
2 that.

3 MS. KANE: -- conversely, when we  
4 deal with the second part of Issue G, which is  
5 have those operations discontinued, we've  
6 gotten away a little bit and we've been  
7 focusing on operating, but the language of the  
8 rule is, have operations been discontinued,  
9 have service been discontinued?

10 And so when we looked through the  
11 chart that you attached to the order and  
12 determined where there were still disputes  
13 with Maritime, there are disputes obviously  
14 with regard to operating, in operation, in  
15 service, which Maritime construes to be  
16 exactly the same thing. And not operating and  
17 not in service, because those are what is  
18 really going to be key to discerning the  
19 questions about Issue G.

20 JUDGE SIPPEL: Well I see, but  
21 again, you changed the scenario that I was  
22 focused on. You're now getting into service,

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1 operation, in service, that type of thing.  
2 And I understand, I mean, I understand what  
3 you're saying but it doesn't say, I have said  
4 it so many times --

5 MS. KANE: It's related to  
6 construction, Your Honor, because it's related  
7 to being the requirement of, in order to be  
8 constructed for the purposes of Section  
9 80.49A, you need to be constructed and placed  
10 in operation. I don't unfortunately have the  
11 rule right in front of me, but the language is  
12 placed in operation. And so we have always  
13 believed --

14 JUDGE SIPPEL: Yes, you do have  
15 that. You had that in your brief. It says  
16 placed in operation within two years from the  
17 grant.

18 MS. KANE: Correct, Your Honor, so  
19 we have always thought that the critical terms  
20 were what constitutes in operation or in  
21 service, because those were relevant to both  
22 figuring out the construction issue and also

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1 the discontinuance of operation.

2 JUDGE SIPPEL: Now do you agree  
3 with that, this Maritime --

4 MR. KELLER: Well, I agree that  
5 80.49A(1), actually there's two parts to the  
6 rule. Mr. Havens keeps saying a substantial  
7 service requirement. That's the first part of  
8 the rule which governs geographic licensees.  
9 But as to incumbent licensees, which this is,  
10 it does say that for incumbent licensees, it  
11 must be constructed and placed into operation  
12 in two years of the date of grant. So I agree  
13 that that's the rule.

14 I also think we're going to be  
15 able to agree very easily on the facts on the  
16 ground, in other words, in the common  
17 definition or the common meaning of the term  
18 that facilities are constructed. As Ms. Kane  
19 points out, we've put the same meaning on  
20 operational and in operation because in our  
21 view, and this is where we start to part ways,  
22 but this is a legal issue at this point not a

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1 -

2 JUDGE SIPPEL: Oh action's what it  
3 will come down to.

4 MR. KELLER: -- we start to part  
5 ways is yes, it is Maritime's position that a  
6 station can be deemed in operation whether or  
7 not it has subscribers or customers. Taking  
8 the constructed part of it, for example, when  
9 the Commission wants to impose a requirement  
10 to have a minimum number of customers in order  
11 to be deemed to be constructed, it spells that  
12 out in its rules.

13 For instance, in the SMR rules, I  
14 think it's 1.9 -- I don't remember the rule  
15 off the type of my head, but it basically, the  
16 rule expressly states that in order to be  
17 deemed constructed you have to get, a facility  
18 has to be constructed and serving at least X  
19 number of mobile units.

20 This rule certainly has no such  
21 requirement. You can construct a system, put  
22 it into operation, that doesn't mean you have

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1 customers on Day 1, it doesn't mean you're  
2 always going to have customers. Secondly --

3 JUDGE SIPPEL: Well --

4 MR. KELLER: -- secondly, later on  
5 from an operations, I mean, the question is to  
6 whether the lack of customers constitutes a  
7 discontinuance of operation. Again, there are  
8 services in which the Commission, and I cite  
9 SMR as an example, that have minimum loading  
10 requirements. If you don't maintain a certain  
11 level of customers or certain mobile units,  
12 your license can be, some channels can be  
13 taken away from you or in an extreme case, you  
14 know, your license can be basically cancelled  
15 because of that.

16 Not only does this service have no  
17 such requirement, there is at least one  
18 precedent that I've cited in one of my  
19 previews somewhere, where the Bureau expressly  
20 stated, the Wireless Bureau that is, or the  
21 Commission, expressly stated there are no  
22 loading requirements in the AMTS.

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1           So this is just to say, as a legal  
2 matter, Maritime will maintain that if a  
3 station is, we would analogize it to say a  
4 soft drink machine, you know, sitting out in  
5 front of the store. It's in service, it's  
6 capable of providing soft drinks if somebody  
7 drops a quarter in, well, I guess a dollar  
8 nowadays, but it doesn't mean that anybody's  
9 going to come up and do that, you know? But  
10 it's in service because it's capable of doing  
11 that.

12           Now, if something goes wrong, if  
13 the machine malfunctions, it's out of service.  
14 In fact, there may be a sign hanging on it  
15 saying out of service. So we do maintain that  
16 whether or not the facility is operational is  
17 a factoral issue. But if it's operational,  
18 argue is it's in service. That's a legal  
19 argument. I'm sure that Mr. Havens will and  
20 the Bureau may or may not argue differently,  
21 and then you will make a decision on that.  
22 But yes, it is our position that you can be

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1 constructed and you can also be in service  
2 without necessarily having a customer right at  
3 the moment.

4 JUDGE SIPPEL: Okay. That's  
5 consistent with your reply to the Bureau --

6 MR. KELLER: Your Honor, could I  
7 interrupt for just a moment?

8 JUDGE SIPPEL: -- anyway, this is  
9 to do with your plea.

10 MR. KELLER: I just want to  
11 interrupt for a moment just to take us, I  
12 don't know if we're done with this issue but -  
13 -

14 JUDGE SIPPEL: I hope so.

15 MR. KELLER: -- but we didn't do  
16 appearances at the beginning and I was going  
17 to state for you that here with us today is  
18 Bob Kirk of the Wilkinson Barker Law Firm, who  
19 will be representing the Choctaw Group.

20 JUDGE SIPPEL: Sure.

21 MR. KELLER: Last Thursday, just  
22 by way of announcement, last Thursday, the

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1 bankruptcy court confirmed the reorganization  
2 plan and specified the Choctaw group as the  
3 buyer of the assets, the licensed assets of  
4 Maritime. In the very near future, that was  
5 of course subject to prior FCC approval and  
6 necessarily regulatory approvals. In the very  
7 near future, applications will be filed for  
8 those assignments of licensees. The formal  
9 second Thursday relief will be requested and  
10 we will be keeping you apprised of that as we  
11 move forward.

12 JUDGE SIPPEL: What's your time  
13 frame, estimated time?

14 MR. KELLER: I'm not sure, but  
15 I'll let Mr. Kirk speak to that.

16 MR. KIRK: Yes, I mean the goal  
17 would be get them on file by the end of the  
18 year, Your Honor, and as quickly as we can.

19 JUDGE SIPPEL: Okay, well --

20 MR. KIRK: The formal order of the  
21 bankruptcy court has not yet been entered and  
22 we're waiting for some materials from the

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1 bankruptcy court to supplement our  
2 application. But we will get them on file by  
3 the end of the year is the intent.

4 JUDGE SIPPEL: Thank you. And  
5 welcome aboard, Mr. Kirk. You going to be in  
6 this, you going to stay with this proceeding  
7 as long as it's around or --

8 MR. KIRK: We will, we'll be  
9 intervening shortly. And hopefully it will  
10 not be like the Summer of Comcast that I spent  
11 with you, Your Honor, no offense.

12 JUDGE SIPPEL: That was a good  
13 fight. I'm not going to count on it, I'm not  
14 counting, but well taken. Well taken, sir.  
15 Okay --

16 MS. KANE: Your Honor, we just  
17 have a question about where we stand now with  
18 regard to the glossary because I know --

19 JUDGE SIPPEL: I'm going to tell  
20 you in a minute where you stand. There's  
21 things that have to be done by Wednesday and  
22 I'm going to, without knowing exactly where

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1       this is going to fall, the following Wednesday  
2       I'd like to have a proposed -- the current  
3       proposed draft of the glossary so I can, you  
4       know, see exactly where you stand as a, the  
5       following Wednesday, which is what date? It's  
6       December 5th. And the things that you can't  
7       agree to, you know, highlight those in some  
8       way. And the things that you're still  
9       discussing, you know, highlight those some  
10      way.

11               MS. KANE: Your Honor, since you  
12      provided us with a chart, is it your  
13      expectation that you would like a chart or  
14      would you like there to be written support  
15      like we did in our briefing before?

16               JUDGE SIPPEL: No, just as you  
17      would, the glossary should just have a term  
18      and a definition for the term, that's all.

19               MS. KANE: Understood, but if the  
20      parties can't agree, how would you like, would  
21      you like a separate briefing from the parties?

22               JUDGE SIPPEL: No, no, just a

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1 statement that, I just want to get a current  
2 status as to what is agreed to, what is not  
3 agreed to, or it doesn't seem, to can't be  
4 agreed to. And then those that are seriously  
5 under discussion. In other words, if you're  
6 at larger heads with two or three, set them  
7 apart that way. If you're still discussing,  
8 and hopefully discussing five others, then set  
9 them forth that way, just so I know where you  
10 are. Anything beyond that we can do it  
11 another time.

12 MS. KANE: So you want just the,  
13 you want the terms and the proposed  
14 definition?

15 JUDGE SIPPEL: Yes, yes, we use  
16 glossaries in those cases, and you can take a  
17 look at one of those.

18 MS. KANE: No, I've looked at  
19 that, Your Honor, I guess that just when we've  
20 submitted our proposed glossary the last time,  
21 there was a lot of legal argument that was  
22 part of the briefing. And so I'm just trying

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1 to clarify for me that you're not expecting to  
2 see that this time. You're just --

3 JUDGE SIPPEL: No, no.

4 MS. KANE: -- expecting to see the  
5 terms.

6 JUDGE SIPPEL: No, I just want to  
7 see where you are. That's the only way I can  
8 do it. And then again, that's something we'll  
9 take from there. Are you with me on that, Mr.  
10 Chen?

11 MR. CHEN: Yes, sir, Your Honor, I  
12 believe that my understanding of what has  
13 proceeded is on Wednesday, December 5th, you  
14 would like all parties to agree on those terms  
15 that we've agreed on and highlight those terms  
16 where we still disagree. I understood you  
17 earlier, Your Honor, to invite a written  
18 presentation of SkyTel's positions on the  
19 terms such as construction which are still in  
20 dispute, and share that memorandum with all  
21 parties as well as with Your Honor.

22 JUDGE SIPPEL: Yes. You can do it

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1 in a cover letter form, it doesn't have to be  
2 elongated, but if you want to submit your, you  
3 know, a concise legal argument and add your  
4 position, but I'm interested primarily in  
5 getting the authorities that Mr. Havens was  
6 referring to when he made his oral --

7 MR. CHEN: Absolutely.

8 JUDGE SIPPEL: -- and that's  
9 really, so that we have it all pulled  
10 together. And that would be --

11 MR. CHEN: And what was it?

12 JUDGE SIPPEL: Well let me think,  
13 I did give you a date on that, didn't I?

14 MR. CHEN: You have not, Your  
15 Honor.

16 JUDGE SIPPEL: Oh, okay. Well,  
17 can you have that by next Wednesday, the 28th  
18 of November?

19 MR. CHEN: That's an extremely  
20 tight deadline in light of everything.

21 JUDGE SIPPEL: All right, well  
22 let's make it, let's do 5 December then.

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1 MR. CHEN: Okay.

2 JUDGE SIPPEL: Is that okay?

3 MR. CHEN: Mr. Havens, do you  
4 think we can put that together by the 5th of  
5 December?

6 MR. HAVENS: Well, I had to talk  
7 to you about that. I'll certainly do my best  
8 on my side. I have to give you a lot for you  
9 to digest.

10 MR. CHEN: I understand that. And  
11 then, Your Honor, I mean literally I have been  
12 involved in this capacity with this case for  
13 less than 24 hours. It is an extremely  
14 aggressive deadline, we're doing our best  
15 here. But I want to ensure that Mr. Havens's  
16 arguments and legal rights are adequately  
17 preserved.

18 JUDGE SIPPEL: Thank you. Well,  
19 that's all right. I didn't think that this  
20 was too much of an imposition because it's  
21 just a question of really pulling together the  
22 authorities that Mr. Havens is relying on.

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1 I'm assuming these are relatively short either  
2 orders or rulings on orders that the  
3 Commission hands out from day to day, from  
4 time to time. And your cover letter, you're  
5 just sort of pulling it together and to sum it  
6 up as to what it's all about. But again, I  
7 don't want to put you at a disadvantage  
8 either. So the earlier I can get it the  
9 better. And the parties too.

10 MR. CHEN: Why don't we, if this  
11 is acceptable to Your Honor, we will make  
12 absolute best effort to comply with the  
13 December 5th deadline, with the understanding  
14 that if, due to the exigencies of the case, we  
15 might need a modest extension, we will request  
16 it on a timely basis.

17 JUDGE SIPPEL: Yes, well request  
18 it please before the 5th of December if you  
19 see that coming on.

20 MR. CHEN: Certainly, certainly.  
21 If we do see that there is a problem coming  
22 down the pike we will be in touch with Your

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